

II. Rejection Under 35 U.S.C. § 103(a)

In the outstanding Office Action, the Examiner has rejected claims 1-83 under 35 U.S.C. § 103(a) as unpatentable over European Patent No. 0 842 652 A1 to *Restle et al.* ("*Restle*") in view of U.S. Patent No. 5,135,748 to *Ziegler et al.* ("*Ziegler*") and over the *Restle/Ziegler* combination in further view of several secondary references.

Applicants respectfully traverse these rejections for at least the following reasons.

The Examiner has failed to establish a *prima facie* case of obviousness because there is no motivation to combine the references cited. The Examiner bears the burden of establishing, among other things, that there exists some suggestion or motivation to modify or combine reference teachings. M.P.E.P. § 2143. This showing must be "clear and particular." *In re Dembiczak*, 175 F.3d 994, 999, 50 U.S.P.Q.2d 1614, 1617 (Fed. Cir. 1999). As discussed below, there is no suggestion or motivation to combine the cited references, nor is there any "clear and particular" showing of such a motivation.

The Examiner recognizes that *Restle* does not teach or suggest, inter alia, an oil and water emulsion comprising at least one amphiphilic lipid, and at least one cationic polymer comprising at least one hydrophobic block and at least one hydrophilic block, as claimed. To remedy this deficiency, the Examiner relies on *Ziegler* which allegedly teaches an "o/w composition comprising quaternary ammonium phosphate esters and 0.01-10% by weight of cationic polymers." (Office Action dated August 16, 2001, page 3, lines 10-12.) The Examiner asserts that "[i]t would have been obvious ... to have modified the composition of *Restle et al.* by adding the cationic polymers, as taught by *Ziegler et al.*, because of the expectation of successfully producing a cosmetic composition with enhanced stability and moisture retention." (Office Action dated

LAW OFFICES

FINNEGAN, HENDERSON,  
FARABOW, GARRETT,  
& DUNNER, L.L.P.  
1300 I STREET, N. W.  
WASHINGTON, DC 20005  
202-408-4000

August 16, 2001, page 3, lines 15-18.) As *Ziegler* is void of any teaching or suggestion to support the proposition that it is the cationic polymers of *Ziegler* that are responsible for such enhanced stability and/or moisture retention, this rejection is improper.

Applicants submit that *Ziegler* teaches a specific combination of a quaternary ammonium functionalized phosphate ester and a cationic polysaccharide, the combination as a whole being useful for moisture retention and enhanced stability of compositions. (*Ziegler*, col. 1, lines 55-65.) Applicants' specification, however, does not disclose a desire to enhance moisture retention of the instant compositions. Rather, the Examiner has imputed the instant specification with this desire solely because it concerns cosmetic compositions. Thus, there is no reason to add the cationic polymer of *Ziegler* to the compositions of *Restle*.

Further, there is no teaching or suggestion in *Ziegler* indicating that either component in isolation would provide these same benefits. In fact, *Ziegler* provides that "[p]oor results were obtained when only Quatrisoft LM-200 [cationic polymer] was utilized in the absence of any Monaquat [quaternary ammonium functionalized phosphate ester]." (*Ziegler*, col. 10, lines 61-62.) Thus, the beneficial results associated with *Ziegler's* composition are expressly taught to be the result of the combination of a quaternary ammonium functionalized phosphate ester and a cationic polysaccharide. (*Ziegler*, col. 2, lines 17-23.) All that one of ordinary skill in the art could extract from the reference is that it is the combination in its entirety that exhibits the moisture retention and enhanced stability, not the cationic polysaccharide alone. For this reason alone, the Examiner has not made a clear and particular showing that

LAW OFFICES

FINNEGAN, HENDERSON,  
FARABOW, GARRETT,  
& DUNNER, L.L.P.  
1300 I STREET, N. W.  
WASHINGTON, DC 20005  
202-408-4000

one of ordinary skill in the art would have been motivated to choose the cationic polysaccharide of *Ziegler* for these purposes.

Even further, combining *Ziegler's* entire combination with the compositions of *Restle* would not render obvious the claimed invention, and thus is also improper. For example, *Ziegler* discloses that its combination of polymers is useful in the form of emulsions. It does not, however, provide any disclosure concerning nanoemulsions. In view of Applicants disclosure concerning the unpredictability of adding just any polymer to their compositions, it would not be reasonable to combine components found in an emulsion with components of a nanoemulsion. For example, Applicants recite, "[w]hen such polymers [e.g., optionally crosslinked polymers] are used in compositions in the form of nanoemulsions, some of such nanoemulsions may tend to exhibit a decrease in at least one characteristic, such as stability and transparency." (Applicants' Specification, page 3, lines 14-16.) Thus, Applicants respectfully submit that combining a reference directed to nanoemulsions with a reference directed to emulsions is not proper.

In view of the lack of teachings detailed above, one can objectively conclude that the Examiner, with the aid of Applicants' specification as a template, pieced together isolated and non-combinable sections of the references in an attempt to reconstruct Applicants' invention—this is improper hindsight reconstruction. Accordingly, Applicants respectfully submit that one of ordinary skill in the art would not have been motivated to combine either the cationic polysaccharides of *Ziegler* or the combination as taught by *Ziegler* with the compositions of *Restle* because *Ziegler* does not disclose any teaching concerning nanoemulsions.

LAW OFFICES

FINNEGAN, HENDERSON,  
FARABOW, GARRETT,  
& DUNNER, L.L.P.  
1300 I STREET, N. W.  
WASHINGTON, DC 20005  
202-408-4000

As the Examiner has failed to make the requisite clear and particular showing of a motivation to combine the references cited, Applicants respectfully submit that the rejection under § 103 is improper and should be withdrawn. Further, as the Examiner has failed to satisfy her burden under 35 U.S.C. § 103, with respect to the primary combination of references, *i.e.*, *Restle/Ziegler*, and the secondary references do not cure the deficiencies of this combination the additional rejections relying primarily on *Restle/Ziegler* are improper.

The Examiner relies on each additional reference for a limitation found in dependent claims, and not to cure the above-described deficiencies of the *Restle/Ziegler* combination. For example, the Examiner relies on EP 078114A1 to *Simonnet* for its teaching of amphiphilic lipids and turbidity of the claimed invention. The Examiner further relies on *Matzik et al.* (U.S. Patent No. 5,716,418) for teaching hair coloring compositions containing anionic surfactants, including fatty alkyl ether citrates. Finally, the Examiner relies on *DeCoster et al.* for its teaching of aminosilicone. Assuming, for the sake of argument only, that the Examiner's assertions regarding the particular teachings of each of these secondary references are accurate, for the reasons stated above, they do not teach or suggest the invention recited in the independent claims, and thus certainly do not suggest claims dependent therefrom. Accordingly, Applicants respectfully request withdrawal of all § 103 rejections.

LAW OFFICES

FINNEGAN, HENDERSON,  
FARABOW, GARRETT,  
& DUNNER, L.L.P.  
1300 I STREET, N.W.  
WASHINGTON, DC 20005  
202-408-4000

III. Conclusion

In view of the foregoing remarks, Applicants submit that the claimed invention is not rendered obvious in view of the prior art references cited against this application. Applicants therefore request the Examiner's reconsideration of the application and the timely allowance of the pending claims.

Please grant any extensions of time required to enter this response and charge any additional required fees to our deposit account 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,  
GARRETT & DUNNER, L.L.P.

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By: 

Michele L. Mayberry  
Reg. No. 45,644

LAW OFFICES

FINNEGAN, HENDERSON,  
FARABOW, GARRETT,  
& DUNNER, L.L.P.  
1300 I STREET, N. W.  
WASHINGTON, DC 20005  
202-408-4000